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RIGHTS IN DATA CLAUSES AND THEIR IMPACT
ON INFORMATION FUNCTIONS OF GOVERNMENT

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Ten years ago, even perhaps as late as five years ago, the title of this presentation would not have been particularly meaningful. However, I am sure you will agree that the information explosion phenomena which we are experiencing today has generated a great deal of discussion on the Government's information systems. Apart from the magnitude of managing the vast amount of information, I believe that there are other factors which have emerged during the last decade to focus interest on this area.

Other speakers will cover the Government as a source of information in this part of the symposium and also in tomorrow morning's session. My discussion will cover the impact of the rights in data on the Government's ability to disseminate and use its data.

It is, of course, well known that the private sector is the major source of the Government's information and data. While the data generated by government employees is a significant portion of the Government's information base, it does not generally pose problems insofar as government use is concerned, and therefore I have not covered it in my talk.

The Government's acquisition of data and information essentially serves two purposes. One is internal to the Government and relates to its housekeeping function and

mission requirements of agencies, such as DOD's mission in defense and NASA's exploration of space; and the other provides for dissemination activities for the public's general welfare. The reasons for the large-scale dissemination activities of the Government will be discussed by Dr. Tribus tomorrow morning. I would like to explore the scope of the Government's rights in data provisions used in the acquisition processes, and how they affect its dissemination function and its use of data within the Government. The computer age, and a new kind of data commonly referred to as "software" will also be considered in the light of the historical approach of the rights in data clauses.

Briefly, let me list some of the substantial and vigorous information dissemination programs and facilities for making government information and data available to the public. Certainly, we are all aware of the role of the Government Printing Office as the publication arm of the United States Government. In addition to this office, each government agency has found it necessary to undertake a dissemination program to fulfill its mission. In fact, some dissemination programs stem from a statutory mandate. As a case in point, NASA's enabling legislation requires that the Administration provide the widest practical and

appropriate dissemination of information concerning its activities and the results thereof.

DOD has established the Defense Documentation Center (DDC) for the dissemination of DOD information; NASA has its Scientific and Technical Information Facility which makes NASA information available; and in like manner, AEC, Agriculture, HEW and the Office of Education operate information dissemination activities.

In addition to these activities, which disseminate general information pertaining to their agencies' activities, special techniques and extensions of these activities have been developed to reach special segments of the public. NASA has established the Computer Software Management Information Center -- code name COSMIC -- at the University of Georgia, and also maintains a sharing library, both of which are keyed to making computer programs generated by NASA, both in-house and under contract, available to the public and government contractors. DOD is also in the process of making some of their computer programs available to the public through COSMIC.

NASA has also established Regional Dissemination Centers (RDC) at six locations to act as transfer agents to make technology available to the business communities. The data

base for these centers include NASA and DOD data and reports and materials from chemical abstract services and the engineering index.

In addition to the Government's role as a data disseminator, a new factor has recently appeared in the procedure in which information is made available to the public. I refer to the enactment of the so-called Freedom of Information Act. Whereas the activities listed above deal with the positive dissemination activities of the Government, the Freedom of Information Act opens up information in the Government's files and makes them available to the public. This may be referred to as access to information versus the dissemination thereof.

As noted, the Government is also an avid user of information and a good deal of its information which it disseminates is originally generated for the Government under contract or grant. The Government conducts over 50% of the research and development sponsored in the United States. This, of course, generates a good deal of this data. The success of the Government's program to disseminate its information or to use it itself depends on the rights in data provisions included in the contract or grant which acquired the data.

But, of course, the Government is not alone in its awareness of the significance of data rights. Beginning back in 1958, when the Comptroller General in effect ruled out patents as a factor to be considered in the award of government contracts, contractors have increasingly turned to enhancing their competitive positions by establishing proprietary data, trade secrets and know-how in the particular field of the procurement. As a result, many government contractors are now able to secure additional contracts or to establish themselves in a sole source position by means of their proprietary data.

Then, too, the advent of the computer age has brought a new kind of data into government procurement, commonly referred to as "software," and because of the nature and value of this data, various new protective techniques are being utilized by its vendors. It was reported in the recent February 2 edition of "Electronic News" that the current government budget for electronic data processing, hardware and software is about \$2 billion in FY 1970 and this figure is expected to increase, particularly in the water and air pollution field and air traffic control. It is not surprising that two large government buyers and EDP users are the DOD and NASA. The "Electronic News" article

further states that the government computer market is one field in which the Government does not pay for research and development, but relies on industry. While I have some question as to the complete accuracy of this statement, since NASA funds a substantial amount of software and hardware, nevertheless it is obvious that the major portion is independently developed by industry.

So we see that rights in data policies have become even more important to the Government to assure that it can perform in its growing new role of a "data disseminator," and continue to be important to the contractor and industry as a means for protecting their intellectual property. Although it may be argued that the existing government rights in data policies are not completely answerable to these objectives, they have served in a manner which has been generally accepted by the parties. The introduction of software type of data into government procurement has changed this picture somewhat and has interjected additional problems for the Government and the contractor in the rights in data area.

Let us look now at the rights in data policies of some government agencies, particularly two of the major government research and development procurement agencies -- the

Department of Defense policies as they exist today, and the National Aeronautics and Space Administration's policies as they existed a year ago.

There are several types of rights in data clauses used by these agencies which, to some degree, vary the allocation of rights in data between the parties, depending upon the type of work involved under the contract. These rights in data clauses and the instructions for their application are found in Section 9, Part 2, of the Armed Services Procurement Regulations (ASPR) for DOD, and in Part 9, Subpart 2, of the NASA Procurement Regulations for NASA. As a matter of fact, if you look at 9.2 of most government regulations, you will see rights in data coverage -- an interesting case of uniformity within the Government.

Generally speaking, the rights in data policies of these two major procurement agencies can be described as follows. ASPR requires a contractor to furnish all data specified to be delivered under the contract. The contractor is permitted to protect his "proprietary data" by submitting it under the contract with restrictive use conditions set forth on a legend affixed to the data. How does one affix a legend to magnetic tape? This legend prohibits disclosure of the data outside the Government except for emergency use and U.S. commitments under treaties.

As to the other non-proprietary data furnished by DOD contractors, the contractor is generally permitted to copyright this data, in which case the Government obtains the right to reproduce, use, disclose and publish the data for governmental purposes. This right permits DOD to disseminate their data through any of its various dissemination outlets. In event the contractor does not elect to copyright this non-proprietary data, the Government may use the data for any purpose whatsoever and have others so do. For all practical purposes, it is thus placed in the public domain.

The NASA rights in data clauses work somewhat similarly, except the contractor protects his proprietary data by withholding it from delivery under the contract. As to non-proprietary data furnished to NASA under its contracts, NASA, like DOD, generally grants its contractors permission to copyright, in which case NASA obtains on behalf of the Government the same license as DOD, giving the Government full rights to use the data in future government procurement, as well as in NASA's dissemination programs. Should the NASA contractor not copyright this data, it is placed in the public domain for use by anyone, as is the case under the DOD data policy.

I am informed that HEW's Office of Education's general rights in data policy is to place all data generated under

its contracts or grants in the public domain, making it freely available for publication or use by anyone for any purpose. They will, however, under certain circumstances, permit the contractor or grantee to copyright the data or literary work, provided the contractor agrees to publish the work and make it widely available in the market place. AEC's general contract data policy is to place generated data in the public domain and prohibit its contractors from establishing any rights to the data.

Turning back to DOD's and NASA's policies, as previously mentioned, these policies have functioned fairly well for handling "technical types of data." It was this kind of data -- engineering drawings, specifications, manuals, scientific and technical reports -- which were initially intended to be covered when the policies were drafted. Under these policies, the Government's rights covered the use of the data for its procurement use and for its dissemination programs; the public could derive substantial benefit from the data by reading, analyzing and studying the data; and the contractors could, if they chose, establish an exclusive commercial copyright position thereon.

Also, the contractor's proprietary data, if it met the tests, could be protected by withholding or by furnishing

it under restricted use conditions (limited rights). At this point everyone seems to be happy. But as software type of data started making its appearance in government procurement, apprehension began to develop among the parties as to whether these existing rights in data policies properly recognized this type of data and provided satisfactory solutions for its handling.

Well, what's so different about software? ASPR rights in data clauses pertain only to "technical data," defined as technical writings, sound recordings, pictorial reproductions, drawings, and works of a "technical" nature. Could all computer programs and software qualify as "technical data" and come within the scope of this clause? NASA's clause was limited to writings, sound recordings, pictorial reproductions, drawings, or other graphic representations. Is a magnetic tape a writing, a sound recording? Where does it fit in under the NASA definition? Do the protective techniques previously mentioned by withholding and marking apply to software and computer programs?

The type of data to be protected under the ASPR policy was again "technical data," which may not encompass all the types of the contractor's software data. You will recall that NASA's protection only extended to manufacturing methods

or processes, chemical compositions, etc., which are maintained in confidence, and which relate to items which were developed at private expense and previously sold or offered for sale. Could it be said that software data meets these requirements?

As a result of this concern, NASA undertook a study of its data policy, and in July 1969 revised its data rights policy and regulations giving specific attention to software. The DOD ASPR Committee is presently reviewing DOD's data policy and regulations from a software viewpoint.

In the NASA revision, the definition of subject data was broadened to cover writings, recordings and pictorial representations. This language extended the scope of NASA's rights in data clauses such that it now clearly includes not only technical data but also non-technical and software type data.

The question which immediately followed was what rights should NASA, representing the Government, grant the contractor to the software, including computer programs, which the contractor generated and developed for the Government under the contract? As previously mentioned, except for certain types of data, motion pictures, government histories and the like, it is, and has been, the general policy of both DOD and NASA to permit its contractors to copyright data produced under

its contracts, and this arrangement had worked rather satisfactorily with regard to the technical type of data. Would it work equally well with software type of data?

In deliberating on this point, it was observed that, unlike most data whose value could be derived by reading and analysis, the principal value of a computer program resided in the ability to use it in conjunction with hardware, i.e. a computer. Moreover, it is quite possible that use of a computer program with a computer would be considered an act of copying under the copyright law and an infringement of the copyright claimed in the program. We were of the view that such use may constitute an act of infringement. In any event, it is so provided in the proposed revisions to the copyright law.

Hence, it may very well be that the public, obtaining a copy of a computer program which had been copyrighted by the contractor and disseminated by the Government, could not use the program without potential infringement of the contractor's copyright. Based on this rationale, it was apparent that NASA, by permitting its contractors to copyright NASA-funded computer programs, would substantially reduce the value of its computer programs when released by COSMIC. It was for this reason that the revised regulations

distinguish computer program data from other data and normally do not grant the contractor the right to copy-right NASA-funded computer programs, computer data bases, or documentation thereof.

This is the policy for computer programs and related software data first developed under NASA funding. What about the policy for a contractor's or vendor's privately developed computer programs and related documentation? NASA's Procurement Regulation 9.202-3 now prescribes NASA's new policy in instances where a privately developed, copy-righted computer program is used or incorporated in the work product of a NASA contract. In essence, this policy states that the contractor should grant or obtain a royalty-free governmental license under the copyright when the material is included in the work product. To do otherwise, the contractor must first obtain permission from the contracting officer.

Finally, the revisions established a new section 9.205-3, dealing with the purchase of existing computer programs or computer program data bases. Here, attention is directed to the potential availability of existing computer programs from a Federal Supply Schedule contract. If the desired computer program is not available from this source, it may be purchased

directly, provided that it meets the authorization requirements set forth by the General Services Administration for direct procurement by government agencies from the vendor. In addition, this section suggests special factors which should be considered when purchasing existing off-the-shelf computer programs. It points out that the contract should adequately describe the computer program, the form of the program to be delivered, i.e. tape punch cards, disc packs, and all the necessary documentation pertaining thereto.

It is also emphasized that the contract should specify any limitations on the right of the Government to use or copy the computer program, such as the physical location, number of uses, and other conditions under which the computer program may be utilized. Conditions of purchase will likely vary in most instances, and in this regard, the contracting officer is advised to consult counsel in drafting rights provisions necessary for these purchases. Trade secret protection, as well as copyrights, can be accommodated under this provision.

What about the contractor who wishes to protect his privately developed computer programs and software by means other than by copyright? The regulations recognize that there are other means which the owner may seek to employ to

protect his computer program. A contractor may elect to safeguard his program by restrictive use or disclosure conditions or he may desire to have NASA recognize his proprietary interest in his computer program in the same manner as NASA presently protects proprietary data, i.e. trade secrets. As to the latter technique, you will recall that proprietary data under the NASA regulations, unlike DOD, is protected by permitting the contractor to withhold such data from delivery. Moreover, the NASA definition and requirements for proprietary data were not designed to cover computer program or software type data, and it is doubtful that many programs could qualify as such. In any event, protection by withholding would obviously not be workable in contracts where a contractor would most likely be concerned about his proprietary computer program, that is, in contracts for the purchase of, or the modification to, his proprietary program.

For those contractors who rely on contractual restrictions on the use or disclosure of their privately developed computer programs, the standard NASA rights in data clause would not suffice and would have to be adjusted or replaced by agreed upon use or disclosure conditions. Inasmuch as our experience to date indicates that the terms and conditions

of such provisions vary considerable, we did not see the feasibility of attempting to draft suitable boilerplate clauses to accommodate provisions of this type. In such cases, NASA may consider tailoring its clauses on a case-by-case basis.

We recognize the argument that the NASA policy will stifle incentives by not permitting the contractor to obtain protection on software developed for the Government and will liken it to a strict title policy in the patent area. But the fact is that NASA is required to seek for the public the widest possible dissemination and benefits for its technology and a contractor's copyright notice on a NASA-funded computer program without efforts by the contractor to exploit and disseminate the program does not, in our judgment, meet this requirement. A deviation to this general policy would be considered by NASA should the contractor establish that a private copyright would enhance the dissemination and utilization of the computer program. Indeed, the proposed regulations indicate that the public interest may be served in certain instances by permitting the contractor to seek copyright protection. Contractors who feel that their exploitation of copyrights will satisfy NASA requirements should present their position to the contracting officer.

We have recently encountered an interesting situation in what appears to be one of the new techniques now being used by some of the software firms to protect their data. It seems that some firms wish to protect their data submitted under a NASA contract by placing on the data both a restrictive legend and a copyright notice. The legend precludes the Government from duplicating and disclosing the material outside the Government (this is generally termed limited rights), while the copyright notice is indicative that the same material has been published and copyrighted under the copyright laws. We view this "dual protection attempt" as basically conflicting and inconsistent and, insofar as the Government's involvement is concerned, probably illegal.

It is recognized that a contractor, assuming equitable justification, may elect to protect his material under a restrictive disclosure or use agreement or, as an alternative, may seek protection by statutory copyright. However, it is our position that when these two are used simultaneously on the same material, each approach would require the existence of conditions which the other would negate or prohibit. In event a restrictive use and disclosure agreement is

selected by the contractor, then the copyright notice, which presumes a statutory copyright has been or is being obtained, should not be permitted in the same material.

The most obvious reason for this position is that under the restrictive agreement, the Government would be precluded from disclosing to the public material which, according to the copyright notice, has already been published. If, on the other hand, the statutory copyright is selected by the contractor, then for reasons stated above, the inclusion of a restrictive disclosure legend on the same material is felt to be improper.

There is an additional problem in this approach when the Government is the purchasing party. Section 1498(a) of Title 28 of the United States Code has, in general, been interpreted as an eminent domain procedure under which the Government cannot be enjoined from infringing privately owned patents, the patent owner's recourse for compensation being by way of administrative claim or suit in the Court of Claims.

Now, if 28 U.S.C. 1498(b), a companion part of the statute which relates to copyrights, is to be given similar interpretation and considered an eminent domain procedure, as the legislative history so implies, then by statute the Government

cannot be enjoined from infringing, that is, duplicating and copying privately owned copyrighted works. As with patents, the copyright proprietor's recourse being an administrative claim against the applicable government agency or a suit in the Court of Claims against the United States. Should this statutory extrapolation be a valid one, and we believe it is, then agreement by a government agency with the copyright owner not to duplicate his copyrighted material could be tantamount to a self-imposed injunction.

Thus, we have the question presented as to whether a contracting officer of a government agency can contract away an eminent domain right of the Government granted by an act of Congress. We think not. In those few instances where this dual protection has been attempted, we have been successful in persuading the potential contractor to make an election between the types of protection which he will use. In most instances, the contractor elected to protect by copyright.

Lastly, we have on the horizon what could be termed a new breed of information systems -- earth resources sensing satellites, and they are likely to have a massive impact on society. The operation of these systems will present a whole

new set of problems, most of which will arise from the data produced by the system. To whom and under what conditions will the data be made available? How will proprietary rights be protected?

For example, the fishing industry will obviously benefit; however, since the U.S. fishing industry rates only 26th in the world, any release of data which benefits it will benefit other fishing fleets more. Perhaps it may be necessary to follow the lead of the Department of Agriculture whose policy is to release crop data simultaneously at various information points so as to create no unfair advantages. Then too, the right to privacy of individuals and organizations must be considered. It is anticipated that data management will be the key to the legal problems created by these systems.

In closing, I would make the observation that the Government, in assuming its relatively new role of a large-scale data disseminator for the betterment of the public interest, is acquiring many attributes normally associated with private industry. As a procurer of data, the Government is now, in certain instances, requiring its contractors to make certain warranties as to the quality of the data furnished by the contractor to the Government; and, as a disseminator or source of data, the Government has become increasingly involved in the question of what are its legal responsibilities

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to others, if any, as to the accuracy of the data and information which it disseminates. In this connection, some government agencies are now using disclaimer notices on the data which it disseminates.

It would seem that there are headaches associated with the new role.